

***United States Court of Appeals
for the Second Circuit***



APPENDIX

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74-2432

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B

P/s

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

-----X

ALICE G. AVRUTICK,

Plaintiff,

and MELVIN ASCENCIO, et al.,

Plaintiff-Appellee,

-against-

MALCOLM WILSON, individually and as
Governor of the State of New York,
et al.,

Defendants-Appellants,

SALVATORE SCLAFINI, et al.,

Defendants.

-----X

JOINT APPENDIX

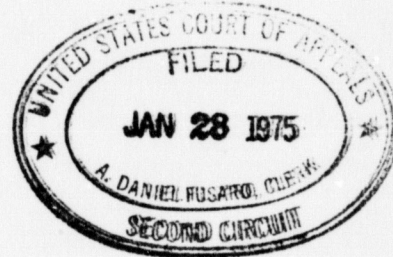
APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE SOUTHERN DISTRICT OF
NEW YORK

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants-Appellants
Two World Trade Center
New York, New York 10047
488-3396

RICHARD J. HILLER
Puerto Rican Legal Defense and
Education Fund Inc.
Attorney for Plaintiff-Appellee
815 Second Avenue
New York, New York 10016
687-6644

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Table of Contents

	<u>Page</u>
Docket Entries.....	1A
Opinion.....	3A
Judgment (appealed from).....	7A

UNITED STATES DISTRICT COURT
CLASS ACTION.

74 CIV. 1590

ATTORNEYS

ALICE G. AVRUTICK and MELVIN ASENCIO,
on behalf of each and on behalf of all
others similarly situated; namely, those
persons newly arrived in New York State
who are precluded from enrolling in the
political party of their choice by the
operation of Section 186 of New York's
Election Law,

Plaintiffs,

v.

For plaintiff:

AMERICAN CIVIL LIBERTIES UNION FOUNDATION,
22 East 40th St. N.Y.C. 10016 725- 1221

For defendant:

LOUIS J. LEFKOWITZ
Two World Trade Center-NYC 10047
(for depts. Wilson & Lomenzo)

ADRIAN P. BURKE, Corporation Counsel
Municipal Building-NYC 10007 (566-2183)
(for depts. Scalfini, Feuer, Sachs, Sadowski,
Eastman, Previti, Kochman, Cassidy, Avarell
and Martinez)

MALCOLM WILSON, individually and as Governor of the State of New York; JOHN P. LOMENZO, individually and as Secretary of State of New York; SALVATORE SCLAFANI, individually and as President, New York City Board of Elections; HERBERT FEUER, individually, and as Secretary, New York City Board of Elections; ALICE SACHS; ANTHONY SADOWSKI, ELRICH EASTMAN; JOSEPH PREVITI; STANLEY KOCHMAN; ELIZABETH CASSIDY; CHARLES AVARELLO and GUMERSINDO MARTINEZ, individually and in their respective capacities as Members of the New York City Board of Elections; ALBERT HAYDUK and WILLIAM VAN WORT, Commissioners of Election for Westchester, County,

Defendants.

		DATE	NAME OR RECEIPT NO.	REC.	DISP.
J.S. 5 mailed	X				
	Clerk	4/7/72	Am C. L. U	NT	
		4/2/72	1157		NT
J.S. 6 mailed	✓				
	Marshal				
Basis of Action:	Docket fee				
CIVIL RIGHTS.	Witness fees				
Action arose at:	Depositions				

74 CR. 1591

Date Of
Judgment

DATE	PROCEEDINGS	Date Of Judgment
Apr 9-74	Filed Complaint. Issued Summons.	
May 6-74	Filed summons and return-served the following: Malcolm Wilson, Governor of the State of N.Y. by Ann E. Lewis on 4-12-74 John P. Lomenzo, Secretary of State of N.Y. by T.W. Wallace on 4-12-74 Salvatore Scalfini, President N.Y. City Board of Elections by James Sisket on 4-15-74 Herbert Feuer, Secretary, N.Y.C. Board of Elections by James Sisket on 4-15-74 Alice Sachs, Member of the NYC City Board of Elections by James Sisket on 4-15-74 Anthony Sadowski, Member, NYC City Board of Elections by James Sisket on 4-15-74 Elrich Eastman, Member NYC City Board of Elections by James Sisket on 4-15-74 Joseph Previti, Member NYC City Board of Elections by James Sisket on 4-15-74 Stanley Kochman, Member NY City Board of Elections by James Sisket on 4-15-74 Elizabeth Cassidy, Member NYC City Board of Elections by James Sisket on 4-15-74 Charles Avarello, Member, NYC City Board of Elections by James Sisket on 4-15-74 Gumersins Martinez- DID NOT SERVE- 4-15-74 Albert Hayduck, personally, on 4-12-74 William Van Wort-DID NOT SERVE- 4-12-74	
May 17-74	Filed ANSWER of defts. Wilson and Lomenzo	L.J
May 16-74	Filed stip & order extending defts' time to answer to 5-22-74	
May 22-74	Filed ANSWER of defts. Scalfini, Feuer, Sachs, Sadowski, Eastman, Previti, Kochman, Cassidy, Avarello and Martinez	A.P
July 25-74	Filed pliffs' affdvt. of Burt Menborde and notice of motion for an order for summary judgment. Ret. 8-24-74.	
Aug. 13-74	Filed pliffs' memorandum of law in support of their motions for summary declaratory judgment and for certification of this action as a class action, and in reply to defts' brief.	
Sep. 5-74	Filed Opinion # 41140- I declare that as to Melvin Ascencio, Election Law s 186 is unconstitutional. His application on 3-15-74 to enroll to vote in the September primary, 179 days later, was timely. The pliff's demand for the declaration of a class is, however, denied. OWEN, J. (m/n)	
Sep 10-74	Filed brief for defts Wilson, Lomenzo & Attorney General.	
Aug 13-74	Filed pliffs' memorandum of law in support of their motion for summary declaratory judgment & for certification of this action as a Class Action, and in reply to defts' brief.	
Sep 10-74	Filed pliffs' memorandum of law in support of their motion for summary	
Sep 11-74	Filed brief for defts Wilson, Lomenzo & Atty General.	
Oct. 10-74	Filed Judgment- ordered that pliffs' motion for a declaratory judgment is granted and it is hereby declared that as applied to Melvin A. Ascencio, New York Election Law, 486. violated the first and fourteenth amendment to the U.S. Constitution and is declared unconstitutional- that as to pliff. Alice G. Avrutick, this action is moot, and that pliffs' motion for certification of this action as a class action is denied. OWEN, J. (m/n) Judgment entered-10-10-74 -Clerk	
Oct. 31-74	Filed defts. Wilson, Lomenzo and the Atty. General of the State of New York, pro se, notice of appeal from Judgment entered 10-10-74 and this appeal is taken only from the first decretal paragraph and no other portion of the judgment. C copies to : Richard J. Hiller, Adrian P. Burke and Westchester County Atty. Entered 10-31-74	
Oct. 24-74	Filed transcript of record of proceedings. Noted 8-20-74	

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OPINION (reported at 382 F. Supp. 984)

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

-----X
ALICE G. AVRUTICK and MELVIN ASENCIO, :
on behalf of each other and on be- :
half of all others similarly situated; :
namely, those persons newly arrived in :
New York State who are precluded from :
enrolling in the political party of :
their choice by the operation of :
Section 186 of New York's Election :
Law, :

Plaintiffs,

74 Civ. 1590

-against-

MALCOLM WILSON, individually and as :
Governor of the State of New York; :
JOHN P. LOMENZO, individually and :
as Secretary of State of New York; :
SALVATORE SCLAPINI, individually and :
as President, New York City Board :
of Elections; HERBERT FEUER, indivi- :
dually, and as Secretary, New York :
City Board of Elections; ALICE SACHS; :
ANTHONY SADOWSKI, ELRICH EASTMAN: :
JOSEPH PREVITI; STANLEY KOCHMAN, :
ELIZABETH CASSIDY; CHARLES AVARELLO :
and GUMERSINDO MARTINEZ, individually :
and in their respective capacities as :
Members of the New York City Board of :
Elections; ALBERT HAYDUK and WILLIAM :
VAN WORT, Commissioners of Election :
for Westchester County, :

Defendants.

-----X

OPINION

Melvin Asencio, a resident of Puerto Rico,
moved to Bronx County, New York, on January 24, 1974.

4a.

On March 15, 1974, he duly registered to vote, but was denied enrollment to vote in the September 1974 primary election by reason of the durational residence requirement of N.Y. Election Law §186 (McKinney 1964).# Asencio now moves for a declaration that as to him, N.Y. Election Law §186 is unconstitutional.** This motion raises the question raised but not reached by the Supreme Court in Rosario v. Rockefeller, 410 U.S. 752, (1973) in footnote 9, page 759.

§186 provides in essence that the last day to enroll to vote in a party primary is thirty days before the general election in the preceding year. Thus, absent special circumstances enumerated in N.Y. Election Law §187 (McKinney 1964) and not applicable here, to vote in a party primary on September 10, 1974, a New York resident must have enrolled in that party before October 7, 1973.

*The action is moot as to Alice G. Avrutik, she having been registered under §187.

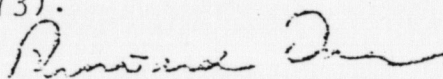
**Asencio seeks declaratory relief in preference to injunctive relief, within the power of a single judge of this Court to grant. This is appropriate procedure, Kennedy v. Mendoza-Martinez, 372 U.S. 144 (1963).

The Court in Rosario, supra, observed that there was a "compelling state interest" in preventing voters affiliated with one party from voting in, that is "raiding", the primary of another party to improperly influence or determine the results of the other party's primary. The Court then held that as to the petitioners in that case, who were at all times New York residents and could have enrolled in conformity with §186, the durational residence requirement was a "legitimate time limitation on their enrollment, which they chose to disregard," 410 U.S. at 762.

However, while it has ^{thus} been held appropriate to require a long-time New York resident to enroll eleven months before a primary to prevent a last minute, easily-accomplished switch to work mischief in another party's primary, in the case before me, the State of New York has not demonstrated and I do not find that the durational residence requirement is necessary to further that state interest, Dunn v. Blumstein, 405 U.S. 330 (1972) at 342-3. In short, I see no substantial risk that a voter from another state or territory, will, at considerable effort, expense and personal dislocation, become a bona fide resident of New York for the purpose of "raiding" a primary.

Consequently, I declare that as to Melvin Asencio, Election Law §186 is unconstitutional. His application on March 15, 1974 to enroll to vote in the September primary, 179 days later, was timely. It was well beyond "...the 50-day registration period approach[ing] the outer constitutional limits in this area,..." Burns v. Fortson, 410 U.S. 686 (1973) at 687, and the 30 days deemed necessary by New York's Election Law §187 for administrative processing, see Dunn v. Blumstein, *supra*, at 347. Since this statute affects constitutional rights, a state must use the least drastic means necessary to achieve the legitimate goal. Shelton v. Tucker, 364 U.S. 479, 488 (1960).

The plaintiff's demand for the declaration of a class is, however, denied. See Galvan v. Levine, 490 F.2d 1255, 1261-2 (2d Cir. 1973).



U. S. D. J.

September 4, 1974.

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

ALICE G. AVRUTICK and MELVIN ASECNCIO,
on behalf of each other and on behalf
of all others similarly situated;
namely, those persons newly arrived
in New York State who are precluded
from enrolling in the political party
of their choice by the operation of
Section 186 of New York's Election
Law,

Plaintiffs,

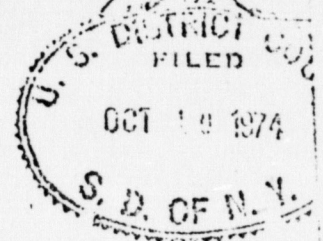
-against-

MALCOLM WILSON, individually and
as Governor of the State of New
York; JOHN P. LOMENZO, individually
and as Secretary of State of New York;
SALVATORE SCLAFINI, individually and
as President, New York City Board of
Elections; HERBERT FEUER, individually,
and as Secretary, New York City Board
of Elections; ALICE SACHS; ANTHONY
SADOWSKI, ELRICH EASTMAN, JOSEPH
PREVITI, STANLEY KOCHMAN, ELIZABETH
CASSIDY, CHARLES AVARELLO and GUMERSINDO
MARTINEZ, individually and in their
respective capacities, as Members of
the New York City Board of Elections;
ALBERT HAYDUK and WILLIAM VAN WORT,
Commissioners of Election for Westchester
County,

Defendants.

JUDGMENT

Upon the pleadings, plaintiffs' motion for summary
declaratory judgment pursuant to Rule 56 of the Federal Rules
of Civil Procedure and plaintiffs' motion for certification of
this action as a class action pursuant to Rule 23(b) of the
Federal Rules of Civil Procedure, and the affidavits filed in
support thereof, and the Opinion of the Court dated September
4, 1974,



74 CIV. 1590
(RGT) (CBM)

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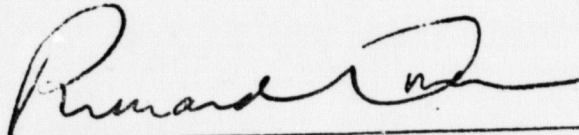
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IT IS HEREBY ADJUDGED THAT, plaintiffs' motion for a ^{and it is hereby declared that as applied to Melvin A. Asencio,} summary declaratory judgment is granted ^{to the extent that} New York Election Law §186 (McKinney 1964) violates the First and Fourteenth Amendment to the United States Constitution and is declared unconstitutional; ^{and it is} ~~as applied to plaintiff Melvin A. Asencio,~~ who arrived in New York State on January 24, 1974 and who on March 15, 1974 duly registered to vote and enrolled in the New York State Democratic Party, but who was denied the right to vote in the September 10, 1974 primary election by reason of the durational residence requirement of New York Election Law §186 (McKinney 1964).

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~~IT IS~~ FURTHER ORDERED, ADJUDGED, AND DECREED, that as to plaintiff Alice G. Avrutick, this action is moot, and

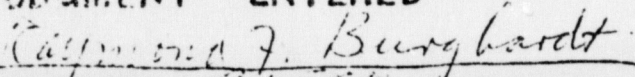
IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that plaintiffs motion for certification of this action as a class action is denied,

Ro
~~AND, IT IS FURTHER ORDERED, ADJUDGED, AND DECREED, that~~ plaintiff Melvin A. Asencio be granted summary declaratory judgment against defendants Malcolm Wilson, John P. Lomenzo, Salvatore Sclafini, Herbert Feuer, Alice Sachs, Anthony Sadowski, Elrich Eastman, Joseph Previti, Stanley Kochman, Elizabeth Cassidy, Charles Avarello and Gomersindo Martinez, individually ~~and in their respective official capacities.~~

Dated: New York, New York
September 17th 1974


RICHARD OWEN
United States District Judge

JUDGMENT ENTERED - 10-10-74


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